

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords III)

Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)

**COPYRIGHT OWNERS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR
RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CLARIFICATION OF THE
DECEMBER 9, 2021 *NOTICE AND SUA SPONTE ORDER DIRECTING
THE PARTIES TO PROVIDE ADDITIONAL MATERIALS***

Copyright Owners respectfully submit this reply in further support of their Motion for Reconsideration or Clarification, eCRB Docket No. 25979 (the “Motion”), concerning the Judges’ December 9, 2021 Order, eCRB Docket No. 25965.¹ The extended length of the Services’ Joint Partial Opposition to the Motion, eCRB Docket No. 25998 (“Opposition”), does not permit reply to every argument offered.² Copyright Owners seek to address the most salient issues herein.

I. The Opposition Profoundly Misstates *Johnson*

The Opposition offers over forty incomplete quotations attributed to the *Johnson* decision, none of which includes a single full sentence from *Johnson*. The Opposition rewrites and substantially misrepresents *Johnson*, taking words out of context and mingling them with assertions nowhere in the decision.

Johnson affirmed the Final Determination in part and only remanded specific issues “for further proceedings consistent with [its] opinion.” *Johnson v. CRB*, 969 F.3d 363, 397 (D.C. Cir. 2020). *Johnson* explicitly states the three discrete issues that it remanded—all of which were limited to *procedural* issues of “fail[ure] to give adequate notice or to sufficiently explain”:

[W]e **affirm in part** and vacate and remand to the Copyright Royalty Board in part because it failed to give adequate notice or to sufficiently explain critical aspects of its decisionmaking. **Specifically**, the Board **failed to provide adequate notice of the rate structure** it adopted, **failed to explain its rejection of a past settlement agreement as a benchmark** for rates going forward, and **never identified the source of its asserted authority to substantively redefine a material term** after publishing its Initial Determination.

Id. at 367.

¹ Capitalized terms not otherwise defined herein have the same meaning as defined in the Motion. Unless stated otherwise, all emphasis herein is added and citations are omitted.

² As the December 13 Order is silent as to a Motion reply brief, this submission complies with the page and word limits in 37 C.F.R. 303.3(c)(3).

Johnson did not hold in error *any* of the Final Determination’s substantive findings. Indeed, it rejected substantive arguments against the Final Determination, including the objection to the rate percentage calculation, which *Johnson* found to be “carefully analyzed,” “grounded in the record,” “reasoned analysis,” and “squarely within the Board’s wheelhouse.” *Id.* at 385-86.³

The Services’ claim that *Johnson* requires a “full reconsideration” of rate levels and structure because *Johnson* vacated in part is wrong. Following vacatur, an agency need only address the errors identified by the reviewing court. *Heartland Reg’l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29–30 (D.C. Cir. 2005) (agency satisfied remand by merely “filling the analytical gap” that reviewing court had identified).⁴ Indeed, going beyond the remanded issues to reconsider

³ The Services confuse the discussion of increased rates in the rate *structure* section of *Johnson*. The Circuit’s discussion of the increased rates was part of its discussion regarding the lack of notice for the Final Determination’s rate structure. *Id.* at 383. The remanded issue remained solely that the Board “failed to provide fair notice of the rate structure it adopted.” *Id.* Indeed, the subsequent section of the Circuit’s opinion confirms that “[a]part from their challenges to the uncapped rate structure, the Streaming Services **separately** leveled objections to the **particular percentages** adopted by the Copyright Royalty Board to calculate the revenue and total content cost prongs.” *Id.* at 384. In the Circuit’s ensuing discussion of the Services’ rate *percentage* objections, the *only* issue remanded was for the Board to provide a fuller *explanation* for its rejection of the *Phonorecords II* benchmark. *Id.* at 387. The rate structure and rate percentage issues are dealt with in separate sections in *Johnson*, and each had a single, discrete issue remanded. The Services’ rewriting of *Johnson* is an effort to obtain from this Board what the Circuit specifically denied them: undoing the Final Determination’s Shapley analysis and the rate percentages derived therefrom.

Likewise, the Services’ attempt to bootstrap their “see-saw” argument into a rate *percentage* argument fails. *Johnson* discusses how this argument was part of the Services’ opposition to expansion of the uncapped TCC prong, citing the Services’ opening appellate brief section titled, “The Linchpin for the Majority’s Justification of the Uncapped Rate Structure—Its Reliance on the “See-Saw” Effect—Is Fatally Flawed.” (No. 19-1028, Services’ Final Sealed Initial Brief, at 33.) To be clear, *the Services’ entire “see-saw” argument on appeal was about expansion of the uncapped TCC rate structure only*, and it is not a backdoor to expand the remand scope to rate percentages.

⁴ The Services’ related argument that vacatur (as opposed to remand without vacatur) reflects doubt about substantive rulings in the Final Determination (Opposition at 7) is unsupported by *Johnson* and the cases they cite. *Johnson*’s remand was to address procedural issues, and vacatur is “the normal remedy” for procedural violations, particularly ones involving lack of notice. *Natural Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020). The law is clear that following vacatur and remand, an agency or court may reach the same result as it did previously. “[T]he usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand.” *Leavitt*, 415 F.3d at 29–30; *American Civil Liberties Union v. DOJ*, 923 F.Supp.2d 310, 313-14 (D.D.C. 2013) (on remand, reinstating vacated ruling without “revisit[ing]” it because prior ruling “was not criticized or overturned in the circuit court’s opinion” but instead was vacated and remanded so that the lower court could take additional evidence bearing on the issue), *aff’d*, 750 F.3d 927 (D.C. Cir. 2014). This proceeding has already “cured the problem” that *Johnson* identified by giving the Services “the opportunity to voice their objections to a completely uncapped total content cost prong.” *Johnson*, 969 F.3d at 383.

issues that were affirmed would be legal error. *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (“Deviation from the court’s remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review.”), *abrogated on other grounds by Shalala v. Shafer*, 509 U.S. 292 (1993).

The three discrete procedural issues *Johnson* identified are the same three discrete issues adopted in the Remand Order defining the scope of this remand. (Remand Order at 1-2.) None of those issues contemplated implementing a new rate structure and rate percentage formula not raised in six years of litigation. Consistent with *Johnson*, the Remand Order allowed new evidence only for the “limited purpose” of addressing the expansion of the uncapped TCC rate prong. (*Id.* at 2.) After a year devoted to building an adequate record on the remanded issues, the Order now considers abandoning the approach built on *Johnson* to forge a new path contrary to the law of the case. It proposes this without notice or explanation as to which of the Final Determination’s substantive findings—many of which were affirmed (or not even appealed), and none of which *Johnson* held to be error—are being abandoned and why. Motion at 2, 8, 21-28. *See Allina Health Services v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014) (affirming vacatur of agency rule for inadequate notice of the scope of proceeding and stating that agencies “may not ‘pull a surprise switcheroo on regulated entities’”); *Delgado v. DOJ*, 979 F.3d 550, 557 (7th Cir. 2020) (“The law-of-the-case doctrine applies to judicial review of administrative decisions.”); *cf. LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (“Inconsistency is the antithesis of the rule of law,” and “courts [are] to be ‘loathe’ to reconsider issues already decided ‘in the absence of extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work a manifest injustice’”).

II. The Services' position on *Johnson's* holdings contradicts itself

The Services' insistence that *Johnson* affirmed the Board's student and family discounts reinforces that the Board's rate percentage calculations were also affirmed. The central passages in *Johnson* concerning student and family discounts state:

As a reviewing court, we ask only whether the Board's determination that students and families have a lower willingness (or ability) to pay is "supported by substantial evidence on the record as a whole." [citation omitted] That is not a high evidentiary bar to clear... The Board's finding about the willingness (and ability) of students and families to pay is **grounded in substantial record evidence**... The Board's decision needed only to be grounded in substantial evidence, not undisputed evidence... Finding facts based on the weight and credibility of the evidence **falls squarely within the Board's expertise**.

969 F.3d at 392-94. *Johnson* nowhere uses the word "affirmed" with respect to the student and family discounts. Yet, the Services insist that "the D.C. Circuit affirmed" the discounts. (*See, e.g.,* eCRB Docket No. 23856 at Services' Joint Rate Proposal at 3, Services' Joint Opening Brief at 18, 26, 27 n.12.) But the language of *Johnson's* affirmance of the Board's rate percentage calculations is even stronger and more detailed:

[T]he Board found that the Phonorecords II mechanical license royalties were too low... **The Board then carefully analyzed the competing testimony and drew from it rates that were grounded in the record and supported by reasoned analysis**... To select **the specific revenue rate**... the Board began by determining the total percent of the interactive streaming services' revenue that should be paid out in royalties to the sound recording rightsholders and the musical works rightsholders collectively. To that end, the Board treated Marx's *upper* estimate of the percent of total revenue that interactive streaming services should pay in royalties as the *lower* bound for the Board's range. ... **Substantial evidence supports that judgment**. The Board then took the *lower* bound of Watt's estimate of the percentage of revenue that should be paid out in royalties and treated that value as the *upper* bound for the Board's purposes. ... **That type of weighing of evidence and decision to proceed cautiously is well within the Board's discretion**. ... The Board ultimately settled on **the revenue rate of 15.1%** "based on the highest value of overall royalties predicted by Professor Marx's model and the ratio of sound recording to musical work royalties determined by Gans's analysis." ... **The Streaming Services argue that the Board acted arbitrarily by relying on the ratio Gans derived even though it "explicitly rejected [Gans' model] as unreliable[.]" [emphasis in original] That is not what happened**. ... When it came to the expert evidence on which the Board chose to rely—the "ratio

of sound recording to musical work royalties that Gans derived from his analysis”—the Board specifically found that aspect of Gans’ analysis to be reasonable and “informative.” **That type of line-drawing and reasoned weighing of the evidence falls squarely within the Board’s wheelhouse as an expert administrative agency.**

Id. at 384-86; *see also id.* at 385-86, 394 (compare: “grounded in substantial evidence” (discount plans) with “grounded in the record... [and] substantial evidence supports that judgment” (rate percentage); compare: “falls squarely within the Board’s expertise” (discount plans) with “falls squarely within the Board’s wheelhouse as an expert administrative agency” (rate percentage)). There is no reasonable way to read these two discussions as signaling different mandates.⁵ While neither discussion uses the word “affirmed” (indeed, no specific issue discussion in *Johnson* uses the word “affirmed”), the Circuit’s extensive discussion explaining how the Final Determination’s revenue rate methodology and calculation was “grounded in the record and supported by reasoned analysis,” grounded in “substantial evidence,” “well within the Board’s discretion,” and “squarely within” the Board’s expertise plainly affirms these findings. The Order appears to propose disregarding these affirmed findings, and without any explanation of extraordinary circumstances and justification, a path that would be legal error.

The hypocrisy of the Services’ position is further revealed in their arguments concerning the bundle revenue definition. They contend taking additional evidence on that issue “would be inappropriate” because “[a]t the start of this remand, all agreed that no new fact or expert evidence

⁵ The same conclusion is true for *Johnson*’s affirmance of the Board’s finding that an increase in royalty rates was necessary. *Compare* 969 F.3d at 387-88 (“the Streaming Services argue that no substantial evidence supports the Board’s conclusion that an increase in the royalty rates for mechanical licenses was necessary... **That is incorrect.** ... To be supported by substantial evidence, the Board’s decision did not have to be irrefutable. It just had to reflect a reasonable reading of the record. **The Board met that test here.**”) *with id.* at 392-94 (“Copyright Owners’ sole argument is that ‘the record lacks evidence to support [the] factual premise’ that ‘students and families have a low willingness to pay’ for digital music. That is wrong. ... The Board’s decision needed only to be grounded in substantial evidence, not undisputed evidence.”).

was necessary to allow the Judges to respond to the Service Revenue definition issue the D.C. Circuit remanded.” (Opposition at 24.) But the bundling issue is no different from the other issues the Order would newly open for evidence: the parties and the Remand Order agreed at the start that the scope of this remand, as defined by *Johnson*, is limited. If *Johnson* and the Remand Order are to be ignored, there is no principled reason to distinguish the bundle revenue definition nor other terms like mechanical floor rate levels and student and family discounts, all of which would have to be analyzed in connection with whatever the new rate structure and rate formulas would be. Indeed, *Johnson* specifically called out the connection between the rate structure and discounts, finding that the uncapped TCC rate prong protects copyright owners from being “harmed by the interactive streaming services’ revenue deferral strategies (**such as student and family discount programs**).” *Johnson*, 969 F.3d at 372. Removing the uncapped TCC prong would require reconsideration of these discounts.

III. The Opposition reinforces the need for clarification

The Services’ professed ambivalence regarding clarification that they still “welcome” is belied by their unsound claims about the Order’s purported rate proposal. As one example, the Services claim that “[t]he Judges’ proposal clearly involves retaining all of the *Phonorecords II* mechanical floors,” which include a 25-cent Mechanical Floor rate for Bundled Subscription Services. (Opposition at 20.) But the Order (at 4) discusses retaining Mechanical Floor provisions that were “unchallenged on appeal in *Johnson*.” It was the Mechanical Floor provisions *in the Final Determination* that were unchallenged on appeal, and those provisions do *not* contain a 25-cent Mechanical Floor rate for Bundled Subscription Services.

As another example, the Services claim that Point 1 of the Order, concerning purported testimony that Major record companies acquire all of the surplus in a Shapley model, is an “obvious reference” to testimony by Prof. Watt, yet the testimony that they cite contains no

reference to the Major record companies (and indeed, Prof. Watt made no reference to Major record companies anywhere in his report or live testimony), nor any reference to anyone acquiring all of the surplus in a Shapley model. (Opposition at 21.)

Copyright Owners respectfully submit that the law calls for reconsideration, and that in its absence, clarification remains essential.

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Respectfully submitted,

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Proof of Delivery

I hereby certify that on Wednesday, January 05, 2022, I provided a true and correct copy of the Copyright Owners' Reply in Further Support of Their Motion for Reconsideration, or in the Alternative, for Clarification to the following:

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